Supreme Court, U.S.
FILED
No. 01 770 NOV - 1 2001
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IN THE

Supreme Court of the United States

LEONARDO R. SANTANA-MADERA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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November 1, 2001

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QUESTIONS PRESENTED

1. Does *Apprendi v. New Jersey*, 530 U.S. 466 (2000), apply to the enhancement of penalties pursuant to the Sentencing Guidelines?

2. Does *Apprendi* apply retroactively to cases on collateral review?

LIST OF PARTIES

Petitioner Leonardo R. Santana-Madera is the only party seeking review of the judgment below.

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Leonardo R. Santana-Madera ("Santana-Madera") respectfully petitions this Court for a writ of certiorari to review the August 3, 2001 decision of the Second Circuit case upholding the denial of his motion for relief pursuant to 28 U.S.C. § 2255 by the United States District Court for the Northern District of New York.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals affirming the denial of Santana-Madera's 2255 motion is reported as *Santana-Madera v. United States*, 260 F.3d 133 (2d Cir. 2001), reproduced in the Appendix ("App.") at 1A. The Court of Appeals' order dated May 4, 2000, granting Santana-Madera's motion seeking, *inter alia*, a certificate of appealability is reproduced in the Appendix at 15A. The Court of Appeals' order dated March 22, 2001, granting Santana-Madera's motion for the expansion of the certificate of appealability is reproduced in the Appendix at 17A. The district court's order dated January 13, 1999, denying Santana-Madera's 2255 motion, is reproduced in the Appendix at 21A.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Second Circuit's decision affirming the district court's denial of Santana-Madera's 2255 motion was entered on August 3, 2001.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition is concerned with the interpretation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. This petition also involves the interpretation of 21 U.S.C. §§ 841 and 846.

STATEMENT OF THE CASE

On September 3, 1992, a grand jury returned an eleven count Superseding Indictment 92-CR-245 ("the Indictment"), charging Santana-Madera and certain co-defendants with one count of Conspiracy To Possess With Intent To Distribute Cocaine and Aiding and Abetting Each Other To Possess Cocaine in violation of 21 U.S.C. §§ 841(a)(1)[1] and 846,[2] and 18 U.S.C. § 2, and eight counts of Distributing and Possession With Intent To Distribute Cocaine in violation of 21 U.S.C. § 841(a)(1). The Indictment further charged Santana-Madera and one co-defendant with engaging in a Continuing Criminal Enterprise ("CCE") in violation of 21 U.S.C. § 848.[3]

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[1] Section 841(a) provides, in relevant part, that "it shall be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a).

[2] Section 846 provides, in relevant part: "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those described for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846.

[3] Section 848(c) provides, in relevant part: "For purposes of subsection (a) of [§ 848], a person is engaged in a continuing criminal enterprise if: (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony,

App. at 28A. On June 3, 1993, the jury found Santana-Madera guilty on all counts.[4]

A. The Trial

1. The Testimony As To Drug Quantity

According to testimony of co-conspirators, Santana-Madera transported cocaine, or caused it to be transported, for redistribution in Syracuse. A government witness testified that, from the end of 1991 until June of 1992, approximately every "week, ten days, sometimes a little longer," one kilo of cocaine was delivered to Santana-Madera's residence 419 South Alvord Street. But co-defendant Raphael Santana, who lived at that address, testified that, on average, "[h]alf a pound, a pound, and very rarely, a kilo" was brought in from Syracuse once a month or "very rarely, once a week." Certain testimony indicated that small amounts of drugs that were not sold but rather "given" to co-conspirators in return for favors or services.

An undercover investigator testified that, on nine separate occasions between May 6, 1992 and June 19, 1992, he purchased a total amount of 28 ounces of cocaine from Santana-Madera or others purporting to act for him.

B. Sentencing Proceedings

The District Court sentenced Santana-Madera to 324 months' imprisonment on Count 4 (possession with

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and (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and (B) from which such person obtains substantial income or resources." 21 U.S.C. § 848(c).

[4] Count 7 did not name Santana-Madera.

intent to distribute), Count 10 (possession with intent to distribute) and Count 11 (CCE) together, and 240 months on Count 2 (distribution and possession), Count 3 (distribution and possession), Count 5 (possession), Count 8 (distribution and possession) and Count 9 (distribution and possession) together, to be served concurrently. The District Court found Count 1 (conspiracy) to be a lesser included offense for sentencing purposes and combined it with Count 11 (CCE), imposing the sentence on Count 11 only.

The 324 months' sentence was based upon the District Court's findings—by a mere preponderance of the evidence—that Santana-Madera's participation in the conspiracy "involved at least 50 but less than 150 kilograms of cocaine." Following the Drug Quantity Table of the Sentencing Guidelines, this finding led to an offense level of 36. U.S.S.G. 2D1.1(c)(2). The District Court added an additional level based upon its finding that drugs were sold from a house located near an elementary school. Following U.S S.G. 3B1.1(a) and 2D1.2, the Court then added a further enhancement of four levels based upon Santana-Madera's supervisory role in the offense, which brought the "total offense level" to 41.

C. Post-Sentencing Proceedings

Santana-Madera appealed on October 18, 1993, and by order dated January 4, 1995, the United States Court of Appeals for the Second Circuit affirmed the conviction.

On July 2, 1998, Santana-Madera filed a motion for relief pursuant to 28 U.S.C. § 2255 with the Northern District of New York. This motion was denied by order dated January 19, 1999.

On February 26, 1999, Santana-Madera filed a Notice of Appeal, which the Second Circuit construed as a motion for a certificate of appealability. Following this

Court's decision in *Richardson v. United States*, 526 U.S. 813 (1999), by order dated May 4, 2000, the Second Circuit granted this motion limited to the following questions: (1) whether the decision in *Richardson* should be applied retroactively; (2) if so, whether trial counsel was ineffective for failing to request the jury instructions required by *Richardson* where the direct appeal was decided prior to the *Richardson* decision; and (3) if so, whether harmless error analysis is applicable such that *habeas* relief is not appropriate.

Following this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), on October 6, 2000, Santana-Madera moved the Second Circuit to expand the certificate of appealability previously granted. By order dated March 22, 2001, the Second Circuit granted this motion, allowing Santana-Madera to raise the issues (1) whether *Apprendi* applies retroactively and (2) if so, whether there was an *Apprendi* error in this case.

By order dated August 3, 2001, the Second Circuit affirmed the district court's denial of 2255 relief. *Santana-Madera v. United States*, 260 F.3d 133 (2d Cir. 2001). The Second Circuit held that *Apprendi* is inapplicable to Sentencing Guidelines calculations that do not result in a sentence on a single count above the statutory maximum for that count. *Id.* at 141. Accordingly, it found that although the district court could have imposed only a sentence of 240 months on Counts 4 and 10, no *Apprendi* error occurred because Santana-Madera's 324 months' sentence was less than the maximum sentence provided for by the CCE statute. The Court further held that the district court's failure to properly instruct the jury on the CCE count was harmless error.

REASONS FOR GRANTING THE WRIT

I

APPRENDI SHOULD APPLY TO THE ENHANCEMENT OF PENALTIES UNDER THE SENTENCING GUIDELINES

In *Apprendi*, this Court held that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the *prescribed statutory maximum* must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. However, this Court further held that it is "unconstitutional for a legislature to remove from the jury the assessment of *facts that increase the prescribed range of penalties* to which a criminal defendant is exposed," and that the relevant inquiry is whether this finding "expose[s] the defendant to a *greater punishment than that authorized by the jury's guilty verdict.*" *Id.* at 490, 494 (emphasis added). *See also id.* at 499 (the Constitution establishes "the right to have a jury determine those facts that determine the maximum sentence the law allows") (Scalia, J., concurring).

This divergent language has created a conflict among the circuits regarding whether the "statutory maximum" within the meaning of *Apprendi* refers only to the penalties set forth in a prohibiting statute, or also to the maximum penalty prescribed by the Sentencing Guidelines. The *Apprendi* Court left these questions open. *See id.* at 523 n.11 (Thomas, J., concurring) (stating that it is "unnecessary to consider whether (and, if so, how) the rule regarding elements applies to the Sentencing Guidelines . . .").

A. A Majority Of Courts Holds That *Apprendi* Does Not Apply To The Sentencing Guidelines

The majority of circuits to consider the issue have limited the term "statutory maximum" to the maximum set forth in the relevant prohibiting statute and denied *Apprendi*'s application to the maximum penalties set by the Sentencing Guidelines. *See, e.g., United States v. Caba*, 241 F.3d 98, 101 (1st Cir. 2001) (stating that the Apprendi principle does not apply to Guideline computations increasing the sentence so long as the sentence actually imposed does not outstrip the statutory maximum); *United States v. Eaton*, 260 F.3d 1232, 1239 (10th Cir. 2001); *United States v. Le*, 256 F.3d 1229, 1240 (11th Cir. 2001).

Following this view, the Second Circuit has held that "*Apprendi* is inapplicable to Guidelines calculations that do not result in a sentence on a single count above the statutory maximum for that count." *Santana-Madera v. United States*, 260 F.3d 133, 141 (2d Cir. 2001) (quoting *United States v. McLeod*, 251 F.3d 78, 82 (2d Cir.), *cert. denied*, ___ S. Ct. ___, No. 01-5770, 2001 WL 991970, at *1 (Oct. 1, 2001)). *Accord United States v. Garcia*, 240 F.3d 180, 183 (2d Cir.), *cert. denied*, 121 S. Ct. 2615 (2001). Under the Second Circuit's approach, "statutory maximum" refers exclusively to the maximum penalty directly provided for by the prohibiting statute itself, *i.e.*, § 841(b). *Santana-Madera*, *id.* at 141 (holding *Apprendi* inapplicable because the sentence was not increased beyond the "*statutory* maximum sentence," even though "the district court's findings increased the sentence required by the Guidelines" (emphasis in original). Therefore, *Apprendi* does not alter a sentencing judge's authority to determine those facts relevant to selection of an appropriate sentence within this interpretation of the "statutory maximum." *Garcia*, 240 F.3d at 183.

B. The Sixth And Ninth Circuits Adopt A Broader Approach To The Meaning Of "Statutory Maximum"

Other circuits adopt a broader interpretation, which would support applying the *Apprendi* rule to the Sentencing Guidelines. For example, the Ninth Circuit has held that all sentencing enhancements that increase the prescribed range of penalties to which a defendant is exposed require a jury finding of guilty beyond a reasonable doubt. *United States v. Nordby*, 225 F.3d 1053 (9th Cir. Sept. 11, 2000) (the "prescribed statutory maximum" mentioned in *Apprendi* refers simply to the punishment to which the defendant is exposed solely under the facts found by the jury). In fact, following the reasoning of the *Apprendi* dissent, the Ninth Circuit has recently held the sentencing scheme under 841 (b)(1)(A) and (B) to be facially unconstitutional on the ground that it allows a judge to find drug quantity under a preponderance of the evidence standard where such finding has the potential of increasing the maximum sentence beyond that specified in 841 (b)(1)(C) for an unspecified amount of drugs. *United States v. Buckland*, 259 F.3d 1157, 1161 (9th Cir.), *reh'g granted*, ___ F.3d ___, No. 99-30285 WL 1091167 at *1 (9th Cir. Sept. 14, 2001) (noting that the *Apprendi* majority's 'reasoning strongly suggests that federal determinate-sentencing schemes . . . are not constitutional.'") (quotation omitted). *See also Apprendi*, 530 U.S. at 541 (O'Connor, J., dissenting) ("Under another reading of the Court's decision, it may mean only that the Constitution requires that a fact be submitted to a jury and proved beyond a reasonable doubt if it, as a formal matter, *increases* the range of punishment *beyond that which could legally be imposed absent that fact*.") (emphasis in original).

Similarly, the Sixth Circuit has repeatedly applied *Apprendi* to findings that raise the mandatory minimum sentence to which a criminal defendant is exposed. In applying *Apprendi* to such mandatory minimums, the Sixth Circuit concluded that "[a]ggravating factors, other than a prior conviction, that increase the penalty from a nonmandatory minimum sentence to a mandatory minimum sentence, or from a lesser to a greater minimum sentence, are now elements of the crime to be charged and proved." *United States v. Ramirez*, 242 F.3d 348, 351 (6th Cir. 2001), *cert. denied*, 121 S. Ct. 1629 (2001). *See also United States v. Garcia-Guizar*, 234 F.3d 483 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1629 (2001) (assuming that *Apprendi* prohibits an increase of the prescribed statutory minimum penalty from no minimum penalty, based on the facts found by the jury, to a 10 year minimum, based on facts found by the judge).

C. *Apprendi* Should Be Applied To Drug Quantity And Other Enhancement Factors That Increase The Range Of Penalties To Which A Defendant Would Be Exposed Under The Sentencing Guidelines

The refusal by most courts of appeals to apply *Apprendi* to Guidelines sentences, when the ultimate sentence is not greater than the maximum in the prohibiting statute, is based upon a misperception of the term "statutory maximum" as used in *Apprendi*, and the constitutional principles underlying that decision.

The Sentencing Guidelines are a *statutory* scheme for sentencing. *See Apprendi*, 530 U.S. 466, 544 (O'Connor, J., dissenting). 18 U.S.C. § 3551 provides that, except in limited cases, a defendant who has been found guilty of an offense under any federal statute shall be sentenced in accordance with the Guidelines. The plain statutory language of 18 U.S.C. § 3551 makes the Guidelines

mandatory and, with certain limited exceptions, controlling. *Witte v. United States*, 515 U.S. 389, 411 (1995) (Stevens, J., dissenting) (the Guidelines are mandatory and a judge must sentence accordingly); *Mistretta v. United States*, 488 U.S. 361, 413, *aff'd*, 873 F.2d 1446 (8th Cir. 1989) (Scalia, J. dissenting) ("While the products of the Sentencing Commission's labors have been given the modest name 'Guidelines,' . . . they have the force and effect of laws, prescribing the sentences criminal defendants are to receive. A judge who disregards them will be reversed."); *Apprendi*, 530 U.S. at 523 n.11 (Thomas, J., concurring). *See also* 18 U.S.C. § 3742(a) and (b).

The approach that the Second Circuit adopted in *Santana-Madera* draws an arbitrary distinction between a maximum penalty directly provided for by the prohibiting statute and a maximum penalty under the Guidelines. If such a distinction were permitted to stand, legislatures would be allowed to immunize drug sentencing schemes against constitutional challenge by simply reversing the structure of the schemes, raising the statutory maximum, while making a judge's finding of limited drug quantities grounds for *lowering* the penalty. As Justice O'Connor noted in *Apprendi*, "[i]t is difficult to understand . . . why the Constitution would require a state legislature to follow such a meaningless and formalistic difference in drafting its criminal statutes." *Id.* at 541 (O'Connor, J., dissenting). In other words, if a legislature can, consistent with the Constitution, make precisely the same difference in punishment turn on the same facts by placing a properly worded maximum sentence in the offense-defining provision, then " 'no constitutional values are served by so formalistic an approach . . .' " *Id.* at 543 (quoting Jones). *See also id.* at 494 ("the relevant inquiry is one not of form, but of effect").

Rather, the actual constitutional principle underlying the Court's decision in *Apprendi* compels the conclusion that "any fact (other than prior conviction) that has the effect, *in real terms*, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 543-544 (emphasis in original); *id.* at 499 (Scalia, J., concurring) (the Constitution establishes "the right to have a jury determine those facts that determine the maximum sentence the law allows"); *id.* at 523 n.11 (Thomas, J., concurring) (discussing the potential application of *Apprendi* to the Sentencing Guidelines given that the Guidelines have the force and effect of laws); *see also id.* at 544 (O'Connor, J., dissenting) ("Justice Thomas essentially concedes that the rule outlined in his concurring opinion would require the invalidation of the Sentencing Guidelines").

The applicability of *Apprendi* to the Guidelines should be obvious. Where an indictment fails to specify the exact type and quantity of controlled substance, which largely determines the sentence, a defendant's due process and jury trial rights are violated. The fact that the criminal statute may specify a greater potential penalty should be irrelevant. The simple fact is that a defendant will be sentenced under no other scheme than the statutory scheme of the Guidelines. Where the jury found no quantity, the applicable Guidelines carry a "prescribed range of penalties" and set a specific maximum penalty, which constitutes the "maximum authorized by the jury's findings" within the meaning of *Apprendi*. It follows that any finding by a judge of a larger quantity then qualifies as a finding of "facts that increase the prescribed range of penalties to which a criminal defendant is exposed," leading to "a greater punishment than that authorized by the jury's guilty verdict" within the meaning of *Apprendi*. The only applicable "statutory maximum" to

be considered is the maximum set under the Guidelines scheme under which the defendant is actually being sentenced.

Accordingly, if a defendant, who is convicted of a particular offense based upon the facts alleged in the indictment, faces a specific sentencing range under the Guidelines, and that sentence is enhanced based upon facts such as drug quantity or the vicinity of an elementary school not alleged in the indictment, an *Apprendi* violation occurs.

D. Santana-Madera's 27 Year Sentence Violated His Fifth And Sixth Amendment Rights

In this case, the only sentence for the § 841 counts authorized under the facts as found by the jury was a sentence of not more than 27 months instead of 27 years. Section 841(b) provides that any person who violates § 841(a) shall be sentenced, in the case of a controlled substance in schedule I or II, "to a term of imprisonment of not more than 20 years." 21 U.S.C. § 841(b)(1)(C). Moreover, the applicable Sentencing Guidelines limit the range of the court's discretion drastically. Under the Guidelines every offense is assigned a base offense level, ranging from 1, the lightest sentence, to level 43, the heaviest sentence. Each offense level corresponds to a certain penalty range, depending on the defendant's criminal history. In the absence of any jury finding on drug quantity, the only Guideline applicable to an undetermined amount of cocaine is § 2D1.1, which provides that the sale of "[l]ess than 25 G of cocaine" corresponds to an offense level of 12. *See* U.S.S.G. § 2D1.1(c)(14). *See also* U.S.S.G. § 2D1.1(a)(3).[5]

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[5] In his Objections to the Presentence Report, Santana-Madera admitted he distributed between 5 and 10 kilograms of cocaine. However, such evidence is irrelevant. *United States v. Gonzalez*, 259 F.3d 355, 361 n.3 (5th Cir. 2001) ("[b]ecause of the juris-

In the present case there has been no jury finding as to drug quantity or the sale of drugs in the vicinity of an elementary school. Accordingly, the base offense level should have been determined to be 12, the level for distributing an undetermined amount of cocaine. Four additional levels may have been legitimately added based upon Santana-Madera's supervisory role.[6] Because the district court determined Santana-Madera's criminal history category to be "1," Court of Appeals Joint apprendix ("C.A. App.") (Transcript of the Sentencing Proceedings) at A-262, the sentencing range for offense level 16 is 21 to 27 months, according to the Sentencing Table. Therefore, the only sentence under § 841 justifiable under the facts as found by the jury would be a sentence of *not more than 27 months*.

However, in this case, the judge found by a mere preponderance of the evidence a drug quantity of more than 50 but less than 150 kilograms of cocaine, corresponding to an offense level of 36. C.A. App. at 261. Finding further that drugs were sold in the vicinity of an elementary school, the judge added one level. *Id.* The judge further added four levels for the defendant's role as organizer. *Id.* at A-261-262. Thus, finding a base offense level of 37 and a total offense level of 41, the district court sentenced Santana-Madera to 324 months' imprisonment. *Id.* at A-262-263. Since the district court

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dictional nature of the error, evidence adduced at trial supporting the drug quantity or stipulations made by the defendant as to the drug quantity are not relevant to our analysis of an *Apprendi* claim in which the indictment fails to allege drug quantity").

[6] The district court did not sentence Santana-Madera for the § 848 conviction separately, but instead merged Counts 4 (distributing cocaine), 10 (distributing cocaine) and 11 (CCE). Thus, the judge's findings on drug quantity and the vicinity of an elementary school, resulting in a base offense level of 37, were the basis of Santana-Madera's entire sentence of 324 months.

merged Counts 4, 10 and 11, it cannot be determined what portion of the 27 years must be allocated to Counts 4 and 10 and which portion to the CCE count.

The Second Circuit, while it acknowledged that "the district court could have imposed only a sentence of 240 months on counts 4 and 10," *Santana-Madera*, 260 F.3d at 136, nevertheless found no *Apprendi* violation when Santana-Madera was sentenced to *27 years* on these two § 841 counts because the maximum penalty for the CCE Court is life. *Id.* at 141. In other words, instead of applying the statutory maximum *for those counts*, the Second Circuit applied the maximum penalty of *another* prohibiting statute, *i.e.*, 21 U.S.C. § 848, applicable to *another* count, based solely on the fact that the district court happened to have merged the two § 841 counts with the § 848 count. *Id.* 136-137, 141.

It is clear, then, that, even under the Second Circuit's interpretation of the relevant "statutory maximum," Santana-Madera's sentence violated his Fifth and Sixth Amendment rights. The Second Circuit's reasoning contradicts this Court's explicit holding in *Apprendi*. *Apprendi*, 530 U.S. at 474 (stating that the constitutional question was only whether the 12-year sentence imposed *on a specific count* was permissible). *See also United States v. McCulligan*, 256 F.3d 97, 105 (3d Cir. 2001) (rejecting the argument that mistakes in determining the sentence on one count may be ignored so long as a greater sentence might have been imposed on another count); *United States v. Nicholson*, 231 F.3d 445 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 1244 (2001) (remanding for resentencing on marijuana distribution and conspiracy counts even though defendant received a life sentence on another crack distribution count).

The view of the majority and the Second Circuit that an aggravating factor such as drug quantity is only an

element of an offense that needs to be charged in the indictment and proven to a jury beyond a reasonable doubt if it raises the sentence above the maximum set by the prohibiting statute is untenable. *Buckland*, 259 F.3d at 1167 (stating that there is no "middle road, by which drug quantity is sometimes an element of the offense that must be proven to the jury beyond a reasonable doubt, and sometimes a sentencing factor that the judge can decide by a preponderance of the evidence"). To draw a distinction between enhancements above and below the maximum set by the prohibiting statute makes little sense from a prosecutorial perspective, for if the government wishes to seek penalties in excess of those applicable by virtue of the elements of the offense alone, then it must charge the facts giving rise to the increased sentence in the indictment and must prove those beyond a reasonable doubt. *United States v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir.), *cert. denied*, 531 U.S. 1026 (2000). As the Ninth Circuit recognized, the approach requiring drug quantity to be proven to the jury only if the resulting sentence is beyond the maximum set by the prohibiting statute, but allowing it to be decided by the judge if it is not, is unworkable; and, as a practical matter, the prosecutor will always have to submit drug quantity to the jury anyway. *Buckland*, 259 F.3d at 1167.

II

APPRENDI SHOULD BE RETROACTIVELY APPLIED

A. *Apprendi* Involves Substantive Law

A majority of courts that have considered the issue have held that *Apprendi* does not apply retroactively on collateral review. *See, e.g., United States v. Moss*, 252 F.3d 993, 998 (8th Cir. 2001) (the *Apprendi* rule does not reside "anywhere near that central core of fundamental

rules that are absolutely necessary to insure a fair trial"); *United States v. Sanders*, 247 F.3d 139, 146 (4th Cir.), *petition for cert. filed*, (U.S. Oct. 9, 2001) (No. 01-6715); *McCoy v. United States*, ___ F.3d ___, No. 00-6434, 2001 WL 1131653, at *8-9 (11th Cir. Sept. 25, 2001); *Jones v. Smith*, 231 F.3d 1227, 1238 (9th Cir. 2000).

Apprendi should be retroactively applied because it involves the substantive construction of a criminal statute. It is settled law that new rules of substantive criminal law that resolve a question as to the meaning of a criminal statute should be retroactively applied. *Bousley v. United States*, 523 U.S. 614 (1998) (stressing that the exception to the rule of retroactivity recognized in *Teague v. Lane*, 489 U.S. 288 (1989), applies only to procedural rules and is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress). *See also Bilzerian v. United States*, 127 F.3d 237, 242 (2d Cir. 1997) (courts "have repeatedly held that a substantive change in the law . . . is properly applied retroactively on collateral review"), *cert. denied*, 527 U.S. 1021 (1999); *United States v. Mandanici*, 205 F.3d 519, 525 (2d Cir.) ("a new rule of substantive criminal law is presumptively retroactive"), *cert. denied*, 531 U.S. 879 (2000); *Gates v. United States*, 515 F.2d 73, 78 (7th Cir. 1975) ("A statute does not mean one thing prior to the Supreme Court's interpretation and something entirely different afterwards").

At issue in *Apprendi* was whether the requirement of a "biased purpose to intimidate," which was part of the sentencing provisions of a New Jersey hate crime statute, should be treated as a sentencing factor, which the judge can find by a preponderance of the evidence, or as a substantive element that must be found by the jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at

490, 495. Stating that "the relevant inquiry is one not of form, but of effect," *id.* at 494, the Court held that, when sentencing factors are used to enhance a sentence, they must be considered substantive elements of a separate, aggravated offense. *Id.* at 494 n.19 (holding that a sentence enhancement is the functional equivalent of an element of a greater offense, and "[i]ndeed, it fits squarely within the usual definition of an 'element' of the offense."). *See also id.* at 477-482. In so holding, the *Apprendi* Court redefined the meaning of sentencing enhancements in criminal statutes like the New Jersey statute *as substantive elements of the crime*. *United States v. Von Meshack*, 225 F.3d 556, 575 (5th Cir. 2000), *amended on reh'g*, 244 F.3d 367 (5th Cir.), *cert. denied*, ___ S. Ct. ___, No. 00-10499, 2001 WL 687052, at *1 (Oct. 1, 2001) ("The broad rule of constitutional law announced in *Apprendi* calls into question our prior rule that drug amount is not an element of a § 841 case"); *United States v. Sheppard*, 219 F.3d 766, 767 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 1208 (2001) ("Based upon the Supreme Court's recent decision in *Apprendi v. New Jersey*, . . . we conclude that drug quantity must often be treated as an element of the offense under § 841") (citation omitted); *Rosario v. United States*, No. 01-5788, 2001 WL 1006641, at *3 (S.D.N.Y. Aug. 30, 2001) ("Since the *Apprendi* rule interprets the meaning of a multitude of criminal statutes . . . it is a substantive rule of law retroactively applicable to cases on collateral review"); *United States v. Clark*, 260 F.3d 382, 384-388 (5th Cir. 2001) (Parker, J., dissenting) (stating that *Apprendi*, even though it has both substantive and procedural components, announces a new substantive rule and must therefore be applied retroactively on collateral review). Thus, *Apprendi* implicates substantive law and applies retroactively.

B. Alternatively, *Apprendi* Is Within The *Teague* Exception

However, even if the rule in *Apprendi* is not deemed to be a rule of substantive law, it belongs to the category of "watershed rules of criminal procedure," which "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding," without which the likelihood of an accurate conviction is seriously diminished, and which are appropriate for retroactive application. *Sawyer v. Smith*, 497 U.S. 227, 241-42 (1990), (internal quotation marks and citations omitted); *Teague*, 489 U.S. at 311-313. Due process of law and the right to trial by jury, which entitle a criminal defendant to a jury determination that he is guilty beyond a reasonable doubt of every element of the crime with which he is charged, implicate fundamental fairness and are of surpassing importance. *Apprendi*, 530 U.S. at 476-77. *See also id.* at 524 (O'Connor, J., dissenting) ("Today, in what will surely be remembered as a watershed change in constitutional law, the Court imposes as a constitutional rule the principle it first identified in *Jones*"); *In re Winship*, 397 U.S. 358, 363 (1970) ("The [reasonable doubt] standard provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law") (internal quotation marks omitted); *Sullivan v. Louisiana*, 508 U.S. 275, 277-278 (1993) (the jury verdict required by the Sixth Amendment right to trial by jury is a jury verdict of guilty beyond a reasonable doubt, and such right to trial by jury is "fundamental to the American scheme of justice") (citations omitted).

Accordingly, *Apprendi* must be applied retroactively. *United States v. Moss*, 252 F.3d 993, 1003-4 (8th Cir. 2001) (Arnold, J., dissenting) (stating that *Apprendi* applies retroactively because it "recognizes bedrock

procedures that are implicit in the concept of ordered liberty and that touch on the fundamental fairness of the trial"). *Cf. Humphrey v. Cain*, 138 F.3d 552, 553 (5th Cir. 1998) (adopting reasoning that denial of the right to a jury verdict beyond a reasonable doubt is so fundamental as to fall under the *Teague* exception); *Adams v. Aiken*, 41 F.3d 175, 179 (4th Cir. 1994); *Nutter v. White*, 39 F.3d 1154, 1158 (11th Cir. 1994) (improper reasonable doubt instruction undermines fundamental fairness of every trial and falls under the *Teague* exception).

CONCLUSION

For the foregoing reasons, Santana-Madera's petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 1, 2001